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No. 10-835

In the Supreme Court of the United States

KEVIN TUCKER, PETITIONER

v.

JOHN CASON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should review Petitioner's fact-bound, run-of-the-mill ineffective-assistance-of-counsel claim, where Petitioner did not raise part of the claim before the Sixth Circuit Court of Appeals, the rest of the claim is of no jurisprudential significance, and Petitioner cannot demonstrate prejudice on the merits.

PARTIES TO THE PROCEEDING

Petitioner is Kevin Tucker, who was convicted in a Michigan court of three counts of first-degree criminal sexual conduct against his five-year-old daughter, AT. Respondent John Cason was the warden of the prison where Petitioner is serving his sentence.[1]

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[1] Petitioner's current warden is Willie Smith.

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On March 4, 2003, in an unpublished opinion, the Michigan Court of Appeals affirmed Petitioner Tucker's convictions on three counts of first-degree criminal sexual conduct. *People* v. *Tucker*, 2003 WL 734168 (Mich. Ct. App. 2003). On September 25, 2003, the Michigan Supreme Court denied Tucker's application for leave in a summary order. *People* v. *Tucker*, 669 N.W.2d 816 (Mich. 2003).

Tucker timely filed a petition for writ of habeas corpus. In an October 23, 2007 Opinion and Order, the district court granted habeas relief on Tucker's claim that defense counsel was ineffective for failing to obtain medical records from the victim's August 1996 automobile accident. Pet. App. 15a–66a. In an August 3, 2010 Opinion, the Sixth Circuit Court of Appeals reversed the district court's grant of habeas relief in a unanimous, unpublished opinion. Pet. App. 1a–14a. The Sixth Circuit denied rehearing and rehearing en banc on October 20, 2010. Pet. App. 69a.

JURISDICTION

The State of Michigan agrees that Tucker timely filed a petition for certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provision is set forth in Tucker's petition. Pet. 1–2.

Also relevant is 28 U.S.C. § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act

(AEDPA), which provides that an application for a writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim. . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(e)(1) of AEDPA provides:

> In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

This Court should deny Tucker's petition for certiorari for four reasons. First, Tucker claims that his counsel was ineffective for failing to obtain another doctor to refute the State doctor's report. But that claim was never before the Sixth Circuit. To the contrary, both the district court and the Sixth Circuit specifically denied a certificate of appealability on this claim. Because this portion of Tucker's claim, which is woven throughout his petition, was neither before nor considered by the Sixth Circuit, it is unpreserved, making the petition a poor vehicle to address the other fact-based issues that Tucker raises.

Second, the remaining portion of Tucker's question presented does not raise a cert-worthy issue. Instead, Tucker treats this Court as an additional appellate error-correcting forum. He neither alleges a split in the circuits regarding his claim, nor does he establish that this case presents a novel and important question of federal law. The Sixth Circuit's opinion reveals that it unremarkably applied the correct standard in concluding that Tucker was not prejudiced. Tucker's claim represents nothing more than dissatisfaction with the Sixth Circuit's fact-bound determination of no prejudice. A petition for certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, yet that is precisely the error Tucker alleges in his petition.

Third, the issue that Tucker seeks to present is of no jurisprudential significance and unlikely to affect the interests of anyone other than Tucker. Because Tucker has failed to articulate a "compelling reason"

under Rule 10 for this Court to grant certiorari review, this Court should deny the petition.

Finally, this Court should deny Tucker's petition because the underlying claim lacks merit. Under the appropriate standard of review, Tucker is not entitled to relief. Because the State court addressed the merits of Tucker's ineffective assistance claim, the pivotal question under AEDPA is whether the State court's decision was an unreasonable application of *Strickland* v. *Washington*, 466 U.S. 668 (1984). This standard, described by this Court as "difficult to meet," *Cullen* v. *Pinholster*, __ U.S. __; 2011 WL 1225705, * 8 (quoting *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011)), was not met here. Tucker has not shown that the State court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786–787.

While the State court's decision should not have been deemed "contrary to" *Strickland* and considered de novo by the Sixth Circuit, the Sixth Circuit nevertheless reached the right result in concluding that Tucker was not prejudiced.

STATEMENT OF THE CASE[2]

The jury was presented with the following four counts of first-degree criminal sexual conduct against Tucker: I) penile/oral penetration; II) penile/anal penetration; III) foreign object/anal penetration; and IV) digital/vaginal penetration. (10/2/00, 57–59.) The acts were alleged to have occurred sometime in the summer of 1996, when the victim, AT, was five-years-old, shortly before Tucker and AT were in an automobile accident in mid-August.

At trial, AT testified that Tucker, while at their home, did some things to her that made her feel uncomfortable. She and Tucker were home alone watching television when Tucker instructed her to remove her clothes. She complied, and he removed his own clothes. Then, Tucker put his "private" part in her vagina, anus, and mouth. After Tucker put his private in her mouth, she felt something "liquidy," like he had "peed" in her mouth. (9/29/00, 60–65.) Tucker then got a pencil from a cup in the kitchen where the pencils were kept and "shoved" the eraser end "up [her] private." AT started crying and Tucker said "Shut up, you big whiney baby." (9/29/00, 66–69.) AT did not tell her mother right away because Tucker had threatened to hit her mom if AT told. Tucker made another threat when AT saw him wearing women's clothes. AT was scared that Tucker would hit her mom. (9/29/00, 69–73.)

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[2] Respondent set forth a more-detailed summary of the facts regarding the trial and evidentiary hearing in its initial brief to the Sixth Circuit.

Dr. Jay Eastman, a pediatrician specializing in the examination of child-abuse victims, testified as an expert for the prosecution. (9/29/00, 99.) He had not examined AT but had reviewed a report prepared by his colleague, Dr. Norma Inocencio, following her examination of AT in October 1999, after the abuse allegations came to light. (9/29/00, 100–01.) Dr. Eastman testified that Dr. Inocencio's findings of irregularities in AT's hymen and anus were "compatible with sexual abuse." (9/29/00, 103–06.) On cross-examination, defense counsel asked Dr. Eastman if he was aware that AT had been in a serious accident. Dr. Eastman responded that he knew about the accident and believed AT had suffered a broken leg, but he was unsure of her other injuries. Dr. Eastman acknowledged that medical records from the accident might be important for purposes of a sexual abuse examination if, for example, the accident had involved "a penetrating injury to the vagina." [3] (9/29/00, 108–09.)

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[3] As the Sixth Circuit pointed out, AT sustained pelvic injuries in the accident, which occurred in mid-August 1996, and experienced vaginal bleeding as a result of her injuries. To determine the cause of the bleeding, doctors performed manual explorations of her vagina, and a vaginoscopy. Pet. App. 3a. According to the deposition of Dr. Stephen Guertin, these procedures entailed the insertion of a finger or medical instrument across AT's hymen into her vagina, which could have resulted in hymenal trauma. (Dep. 9/17/01, 27–29.) This information was not presented to the jury, presumably because counsel—who, as Respondent argued below, did not know or have any reason to believe that any injuries that AT may have sustained from the automobile accident were in any way similar to injuries indicative of sexual assault—had not obtained AT's medical records from the accident. Pet. App. 3a.

Also testifying at trial was AT's mother, who testified about AT's disclosure of the assaults, and Sam Sargente, who was married to Tucker's ex-wife's sister. Sargente worked with Tucker and recalled a conversation he and Tucker had, with Tucker eventually telling him that the only thing he ever did to AT was put two of his fingers in warm water and then put them in AT's vagina to rinse her out. Tucker held up his two fingers in the air when he told Sargente this. (9/29/00, 140–41.)

Tucker testified, giving the jury the opportunity to assess his credibility. Tucker denied doing anything to AT. (9/29/00, 152.) Tucker admitted talking to Sargente but denied telling him about washing AT's vagina. Tucker surmised that Sargente may have been confused because Tucker did tell him of a cayenne pepper incident involving AT whereby Tucker put cayenne pepper on his finger and placed his finger on AT's tongue for sassing him. (9/29/00, 165–71.)

Also testifying for the defense was Tucker's sister, his mother, and several acquaintances, as well as an expert who testified about cross-dressing and sex abuse allegations. (9/29/00, 212–26.)

At one point, during defense counsel's extensive closing argument, he pointed to Dr. Inocencio's failure to review those records, and asked the jury, "might that not be important to review reports? Do we know that something of that nature didn't happen during the course of the accident?" (10/2/00, 39–40.) In rebuttal, the prosecution replied, in part, that there was no testimony that "when [AT] was in this car accident she was penetrated by something." (10/2/00, 44–45.)

The jury convicted Tucker on the first three counts of first-degree criminal sexual conduct, but found him not guilty of digital/vaginal penetration. Tucker received concurrent sentences of 85-to-240 months of incarceration on each count.

Tucker moved for an evidentiary hearing and a new trial, arguing that his defense counsel was ineffective because he had not obtained AT's medical records from the automobile accident. The trial court granted Tucker an evidentiary hearing. Tucker called four witnesses at the hearing: defense counsel, Tucker's sister and her husband, and Dr. Inocencio, who had since reviewed AT's emergency room records from the accident.[4] The pertinent portions of Dr. Inocencio's testimony are discussed below.

Following the hearing, the trial court determined that defense counsel's failure to obtain the medical records did not fall below an objective standard of reasonableness, and denied Tucker's motion for a new trial.

The Michigan Court of Appeals and Michigan Supreme Court affirmed Tucker's convictions.

In October 2003, Tucker filed a petition for writ of habeas corpus. The district court found merit in Tucker's ineffective assistance claim with respect to his counsel's failure to obtain the medical records and granted habeas relief. The Sixth Circuit reversed.

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[4] AT was treated at Mount Clemens General Hospital immediately following the accident. She was then transferred to Children's Hospital. Dr. Inocencio reviewed only the Mount Clemens records. (9/29/01, 57, 67.)

REASONS FOR DENYING THE PETITION

This fact-based case does not warrant this Court's intervention. The State respectfully requests that certiorari be denied for the following reasons.

I. Part of the claim that Tucker presents to this Court was neither before nor considered by the Sixth Circuit Court of Appeals.

Tucker's question presented raises two different claims of ineffective assistance of trial counsel: that counsel was ineffective for failing to obtain medical records from the victim's automobile accident, and that counsel was ineffective for failing to obtain another doctor to refute Dr. Inocencio's report. The problem with the latter claim—which is woven throughout the petition—is that it was never properly before the Sixth Circuit.

While Tucker raised the claim in his habeas petition, the district court denied relief, noting that the record showed that counsel had indeed pursued attempts to obtain expert assistance to attack Dr. Inocencio's report. Pet. App. 52a. When Tucker attempted to raise this claim in the Sixth Circuit in a cross-appeal, the Sixth Circuit remanded the matter to the district court to determine whether a certificate of appealability should be granted.[5] The district court specifically denied a certificate of appealability on this claim. Resp. Brf. App. 3a–4a. The Sixth Circuit also denied Tucker a certificate of appealability on this

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[5] In habeas cases, a petitioner has no automatic right to appeal a district court's denial of the petition. Instead, a petitioner must first seek and obtain a certificate of appealability. 28 U.S.C. § 2253; *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003).

particular claim. Resp. Brf. App. 7a. Because this portion of Tucker's petition was neither before nor considered by the Sixth Circuit, it is unpreserved and this Court should not consider it. *Meyer* v. *Holley*, 537 U.S. 280, 291 (2003) ("[I]n the absence of consideration of . . . matter by the Court of Appeals, we shall not consider it."); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.")[6]

II. This Court should decline to review Tucker's fact-specific ineffective assistance of counsel claim.

Tucker asserts that counsel was ineffective for failing to obtain medical records at the time of trial. Tucker's claim is simply a request for this Court to review the fact-bound determination of the Sixth Circuit. As such, the question presented is not worthy of certiorari review.

A. Tucker's fact-bound claim has no jurisprudential significance.

Tucker raises a run-of-the-mill ineffective assistance claim, asserting that this case concerns the "improper application" of *Strickland*. Pet. 2. But the Sixth Circuit's opinion reveals no such misapplication.

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[6] Even if considered, the State court's decision on this claim was not an unreasonable application of *Strickland*, as even the district court found. To the extent that Petitioner suggests that counsel was ineffective for conceding that sexual abuse occurred (Pet. 13), this claim, too, was neither before nor considered by the Sixth Circuit.

Rather, the Sixth Circuit unremarkably applied the correct standard in concluding that Tucker was not prejudiced by his counsel's conduct. The medical records had no relevance whatsoever to the penile/oral penetration charge of which Tucker was convicted. To the extent that the records may have shown an alterative explanation for the injuries to AT's genitals, Tucker was acquitted of the one charge to which such an alternative explanation would have been relevant: the digital/penetration charge. And with respect to the two charges involving anal penetration of which Tucker was convicted, the Sixth Circuit correctly determined that the medical records would have been of little, if any, help in countering the medical evidence presented at trial and, in fact, would not have supported the argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse.

While Tucker may be unsatisfied with the Sixth Circuit's decision, the Sixth Circuit's fact-bound finding is not a cert-worthy issue. Supreme Court Rule 10 states that "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. Yet those are precisely the errors that Tucker asserts in his petition.

B. Tucker has failed to allege a split in the circuits, or that the Sixth Circuit's decision conflicts with *Strickland*. Nor does he present a novel or important question of federal law.

A core ground for granting certiorari is a conflict among the courts of appeals, or a conflict with a decision of this Court. Sup. Ct. Rule 10(a). But Tucker does not allege that there is a split in the circuits regarding his ineffective assistance of counsel claim. Nor does Tucker demonstrate that the Sixth Circuit's decision conflicts with decisions from this Court, or presents a novel and important question of federal law. The issue that Tucker seeks to present is of limited importance and unlikely to affect the legal interests of anyone other than himself. Because Tucker has failed to articulate a "compelling reason" under Rule 10 for this Court to grant certiorari review, this Court should deny the writ.

III. Certiorari should be denied because Tucker's underlying claim lacks merit.

Tucker argues primarily that counsel was deficient in failing to obtain the victim's medical records. The State does not disagree with Tucker's general assertion that a trial attorney may be deemed deficient on the basis of inadequate investigation, Pet. 6, but that is not what happened here, as the State court reasonably determined. And regardless of whether defense counsel's performance was deficient in the instant case, Tucker cannot show the requisite prejudice, whether review is under AEDPA or de novo.

A. In this habeas case, the State court's merits adjudication should have been accorded deference under AEDPA.

Where the State court adjudicated the merits of Tucker's ineffective assistance of counsel claim, and where its decision was not contrary to *Strickland*, the Sixth Circuit, on habeas review, should have accorded deference to that decision under AEDPA. Despite this, the Sixth Circuit nevertheless reached the right result on de novo review in concluding that Tucker could not meet *Strickland*'s prejudice prong.

There is no question that the State court addressed the merits of Tucker's ineffective assistance claim.[7] A State court's adjudication on the merits is entitled to deference and analyzed under the "unreasonable application" standard, unless it is "contrary to" clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1). "A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell* v. *Esparza*, 540 U.S. 12, 15–16 (2003) (per curiam)

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[7] Indeed, this Court in *Richter* said that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any of any indication or state-law procedural principles to the contrary." And § 2254 "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Richter*, 131 S. Ct. at 784–85.

(quoting *Williams* v. *Taylor*, 529 U.S. 362, 405–06 (2000)). A State court adjudication that is "contrary to" controlling federal law is reviewed de novo by the federal court.

In this case, the Sixth Circuit deemed the State court's decision "contrary to" *Strickland*. This Court has rejected such an overly critical review by a federal appeals court before.[8] *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam). In the present case, before addressing Tucker's claim, the State court stated that "[a] successful claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, this factfinder would not have convicted the defendant." *People* v. *Tucker*, 2003 WL 734168, *2 (Mich. Ct. App. 2003). This is the correct standard, consistent with *Strickland*. Although the State court later articulated the standard in a less precise form, in the context of finding no prejudice, the State court's opinion was not a repudiation of *Strickland*.

A review of the entire opinion reveals that the State court understood the correct standard. The Sixth Circuit's readiness to attribute error to the State court is inconsistent with the "presumption that State courts know and follow the law," *Woodford*, 537 U.S. at 24; see also *Holland* v. *Jackson*, 542 U.S. 649, 655 (2004),

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[8] In *Woodford*, 537 U.S. at 23–24, this Court held that the Ninth Circuit had mischaracterized the state court opinion in finding that it used the wrong standard to determine prejudice. This Court took issue with the Ninth Circuit's readiness to attribute error to the state court's reasoning, and found it inconsistent with the presumption that state courts know and follow the law.

and "also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which also demands that State court decisions be given the benefit of the doubt." *Woodford*, 537 U.S. at 24 (internal citations omitted).

Because the State applied the correct legal rule in considering Tucker's run-of-the-mill, ineffective-assistance claim, the question in this case should have been whether the State court's adjudication involved an unreasonable application of clearly established Supreme Court precedent. *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000) (O'Connor, J., concurring (speaking for a majority of the Court)) (a run-of-the-mill state court decision applying the correct legal rule from Supreme Court cases to the facts of a particular case does not fit within 28 U.S.C. § 2254(d)(1)'s "contrary to" clause and should be reviewed under the "unreasonable application" clause.) This is a difficult standard for Tucker to meet.

Under *Strickland*, a defendant must show that counsel's performance was deficient and resulted in prejudice, or, that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694. To show prejudice requires a "substantial," not just "conceivable" likelihood of a different result. *Pinholster*, 2011 WL 1225705, at *12 (quoting *Richter*, 131 S. Ct. at 792.) "Surmounting *Strickland*'s high bar is never an easy task." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254 is all the more difficult." *Richter*, 131 S. Ct. at 788. This Court has recognized that "[t]he standards

created by *Strickland* and § 2254 are both 'highly deferential,'" *Richter*, 131 S. Ct. at 788 (quoting *Strickland*, 466 U.S. at 689), and "when the two apply in tandem, review is 'doubly' so."[9] *Richter*, 131 S. Ct. at 788 (quoting *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1413 (2009)).

The question on habeas is not whether a federal court believes the State court's determination of *Strickland* "was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles*, 129 S. Ct. at 1420 (quoting *Shriro* v. *Landrigan*, 550 U.S. 465, 443 (2007)). And because the *Strickland* standard is a general standard, this Court has said that a State court "has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 129 S. Ct. at 1420; see also *Renico* v. *Lett*, 130 S. Ct. 1855, 1864 (2010); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule's application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations"). Under the doubly-deferential judicial review that applies to a *Strickland* claim evaluated

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[9] This Court has recently reiterated that obtaining relief on habeas is difficult: "Section 2254(d) reflects the view that habeas corpus is a guard against extreme functions in the state criminal justice systems, not a substitute for ordinary error correction through appeal . . . . As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-787.

under the § 2254(d)(1) standard, Tucker's ineffective assistance claim fails.

It was hardly unreasonable for the State court to conclude that Tucker failed to show prejudice.[10] The records would only have presented an alternative explanation for the victim's physical condition—they would not have called into question the victim's compelling testimony against Tucker. The record before the State court reasonably supported its denial of Tucker's ineffective assistance of counsel claim. Tucker has failed to show that the State court's application of the especially broad standard of *Strickland* was unreasonable.

Supporting the State court's finding is the decision of the Sixth Circuit, which also found no prejudice. In granting habeas relief, the district court found it significant that the jury heard "no alternative explanation for the injuries to AT's genitals." Pet. App. 50a. But the Sixth Circuit rightly noted that:

> [Tucker] was acquitted of the one charge to which such an alternative explanation would have been relevant: the digital/vaginal penetration charge. Thus, presentation of evidence that the doctors treating AT after the car accident inserted fingers and medical instruments into her vagina to determine the cause of the vaginal bleeding, would not likely

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[10] The State court also reasonably concluded that counsel's failure to obtain the medical records from AT's automobile accident did not constitute deficient performance. But the deficient performance prong need not be considered because Petitioner cannot show prejudice.

> have resulted in a more favorable outcome for [Tucker].

Pet. App. 11a (internal quotations omitted). In other words, the medical records had no relevance to Tucker's actual conviction for penile/oral penetration.

The only other information in the medical records of potential relevance to the charges of which Tucker was convicted is a notation that AT had "good sphincter tone" following the automobile accident. The Sixth Circuit noted that:

> At first glance, this notation, as well as the absence of any indication of trauma to AT's anus at the time of the accident, appears to contradict Dr. Inocencio's later finding that AT had deep anal fissures consistent with sexual abuse. However, Dr. Inocencio testified at the evidentiary hearing that sexual abuse would not necessarily affect a child's sphincter tone; rather, sphincter tone would only be damaged in cases of severe abuse involving the use of force. Moreover, according to Dr. Inocencio, sphincter tone is better determined through the use of a colposcope, a procedure generally not undertaken in emergency room examinations.

Pet. App. 11a–12a.[11]

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[11] The Sixth Circuit also pointed out that, under Michigan law, the State was not required to prove that Petitioner penetrated AT forcefully. The applicable statutory definition of "sexual penetration" includes "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." Pet. App. 12a.

More significant, the Sixth Circuit noted that the medical records provided no alternative explanation for the anal fissures noted in Dr. Inocencio's report. Pet. App. 12a. Dr. Inocencio testified that there "definitely" would have been an indication in the medical records if anal bleeding or fissures had been observed following the automobile accident. (8/29/01, 61.)

Dr. Stephen Guertin, a child abuse expert who reviewed the accident records after trial, found nothing of significance in the records with respect to the anal-penetration charges. But as the Sixth Circuit noted:

> While the absence of anal trauma after the accident tends to undermine the State's theory as to when the abuse occurred, it is even more damaging to an argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse. Thus, the hospital records would have been of little, if any, help in countering the medical evidence presented by Dr. Eastman regarding the anal-penetration charges and, in fact, would not have supported the argument [Tucker] now contends his trial counsel should have pursued.

Pet. App. 12a.

The Sixth Circuit correctly concluded that given (1) the relatively brief direct-examination testimony of Dr. Eastman regarding AT's anal injuries, (2) Dr. Inocencio's evidentiary hearing testimony that good sphincter tone is not necessarily inconsistent with sexual abuse, and (3) the lack of any other information contained in the medical records relevant to the charges of conviction, it was not reasonably probable

that the jury would have reached a different conclusion had the records been presented at trial. Pet. App. 14a. Defense counsel's failure to obtain the records therefore resulted in no prejudice.[12]

B. Even if Tucker's claim was reviewed de novo, it would still fail, as the Sixth Circuit properly found no prejudice.

Although the Sixth Circuit should have given deference to the State court's decision, the Sixth Circuit nevertheless reached the right result on de novo review by concluding that Tucker could not meet *Strickland's* prejudice prong.

The Sixth Circuit indisputably applied the correct *Strickland* standard when considering Tucker's ineffective assistance claim. That is, to show prejudice under *Strickland*, Tucker must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Notably, a showing of prejudice requires a "substantial," not just "conceivable," likelihood of a different result. *Pinholster*, 2011 WL 1225705, at *12 (quoting *Richter*, 131 S. Ct. at 792). *Strickland*'s bar is "high" and surmounting it "is never an easy task." *Padilla*, 130 S. Ct. at 1485.

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[12] The Sixth Circuit did not address the deficient performance prong of *Strickland* because it was not required to do so. If a defendant suffered no prejudice, it is irrelevant whether counsel's performance was deficient. Recognizing that this will often be the case, this Court has instructed that "there is no reason" to address the performance aspect first "or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

The Sixth Circuit's unremarkable application of *Strickland* and its fact-bound determination of no prejudice was adequately supported by the record. As noted above, the medical records had no relevance to the penile/oral penetration charge of which Tucker was convicted. To the extent that the records may have shown an alterative explanation for the injuries to AT's genitals, Tucker was acquitted of the digital/penetration charge—the one charge to which such an alternative explanation would have been relevant. And with respect to the two charges involving anal penetration of which Tucker was convicted, the Sixth Circuit correctly determined that the medical records would have been of little, if any, help in countering the medical evidence presented at trial and, in fact, would not have supported the argument that the injuries noted by Dr. Inocencio were the result of the accident and not sexual abuse. The petition for writ of certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: APRIL 2011

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN TUCKER,

Petitioner,

v. Case No, 03-10254

Honorable David M. Lawson

JOHN CASON,

Respondent.

_____ /

ORDER DENYING CERTIFICATE OF APPEALABILITY

This matter is before the Court on remand from the Sixth Circuit for the sole purpose of determining whether to grant or deny a certificate of appealability to the petitioner. The Court already issued a conditional writ of habeas corpus with respect to one of the petitioner's claims of ineffective assistance of counsel on October 23, 2007. The Court was persuaded that trial counsel rendered ineffective assistance when he failed to obtain medical records of injury to the victim's pelvis and vagina that happened before the alleged sexual assault and that could have provided an alternative explanation for the victim's hymen and anal tissue abnormalities that were critical in convicting the petitioner of sexual molestation. Accordingly, the Court ordered a conditional grant of the petition for writ of habeas corpus under the terms of which the respondent would be released unless the state chose to retry him within seventy days.

Originally, the petitioner advanced four claims for habeas corpus relief. These grounds were:

> I. The trial court reversibly erred in refusing the jury's reasonable requests for the rereading of trial testimony, in violation of the right to due process and a fair trial, and defense counsel was ineffective for failing to object.
>
> II. Defense counsel was ineffective for failing to have Dr. Inocencio's report and the photographs taken during her examination reviewed by another doctor, for failing to obtain the medical records from [the complainant's] automobile accident, for conceding that sexual abuse occurred, for eliciting testimony that [the complainant's] previous statements and testimony were consistent with her trial testimony, when they were inconsistent, and for failing to impeach witnesses with prior inconsistent testimony.
>
> III. The petition should be granted where the court permitted highly prejudicial testimony that Mr. Tucker was a cross dresser over defense objection, without giving a cautionary instruction, despite the court's intention to do so, and, in the alternative, defense counsel was ineffective for failing to object to the failure to give a cautionary instruction.
>
> IV. The cumulative effect of these errors denied due process and the right to a fair trial.

Opinion & Order Conditionally Granting Petition for Writ of Habeas Corpus [dkt # 26], at 14. As mentioned above, the Court found that only the trial counsel's failure to investigate the circumstances of the victim's automobile accident and obtain medical records of her treatment

warranted habeas corpus relief; as to the other grounds, the Court held that the petitioner's arguments lacked merit. Both parties cross-appealed from the Court's order.

I.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues presented were "adequate to deserve encouragement to proceed further." *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted).

District courts must make an "individualized determination" under the standards set forth in *Slack* and *Miller-El* as to each substantive claim presented by the petitioner. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In Re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

II.

Apart from the willing argument, the petitioner made four more ineffective assistance of counsel claims, all of which were found to be without merit by the Court. They alleged: (1) the failure of trial counsel to have Dr. Inocencio's report and photographs reviewed by another doctor; (2) trial counsel's concession that sexual abuse

occurred; (3) elicitation by counsel of testimony that the complainant's previous statements and testimony were consistent with her trial testimony; and (4) the failure to impeach witnesses with prior inconsistent testimony.

On the first of those claims – that the petitioner's counsel should have asked other physicians to review Dr. Inocencio's findings – the Court found that the trial attorney pursued attempts to obtain expert assistance in order to attack Dr. Inocencio's report. Counsel apparently contacted three physicians seeking to rebut Dr. Inocencio's testimony but in light of their responses or lack thereof, his determination not to call a physician as an expert did not amount to conduct that fell below the generous standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Secondly, regarding the concession of guilt, the Court concluded that the argument was abandoned because the petitioner failed to develop it or present any authority to support the claim in his briefs. And regarding the third claim, that counsel should have impeached the victim and her mother with regard to the dates on which the sexual abuse allegedly occurred, the Court upheld the Michigan court of appeals' conclusion that such move was neither contrary to nor an unreasonable application of *Strickland* to the facts of this case because failure to impeach the victim and her mother did not result in prejudice to the defendant. Having revisited the petitioner's unsuccessful ineffective assistance of counsel claims, the Court now finds that reasonable jurists could not debate that this Court correctly dismissed the petitioner's first claim or that the issues presented were adequate to deserve encouragement to proceed further.

III.

The petitioner also argued that he was denied a fair trial because the trial court refused to honor the jury's requests to reread trial testimony. The Court found that

this claim was procedurally defaulted and upheld the Michigan court of appeals' decision that the petitioner was not prejudiced by the trial court's refusal to provide the jury with the transcripts. Further, the Court did not find any miscarriage of justice to overcome a procedural default in the absence of cause and prejudice. The Court now concludes that the petitioner has not satisfied the standard for issuance of a certificate of appealability on this claim either.

IV.

The petitioner's next claim for habeas corpus relief is that the trial court erroneously admitted highly prejudicial testimony that the petitioner was a cross dresser without giving a limiting instruction and without trial counsel requesting it. The Court found that as a matter of trial tactics, these decisions did not constitute deficient performance, and did not prejudice the defense in a way that would deprive the petitioner of the reliable trial. After considering this claim again, the Court concludes that reasonable jurists could not debate that this Court correctly dismissed the petitioner's evidentiary mistake claim and the claim does not deserve encouragement to proceed further.

V.

The petitioner's final claim was based on the cumulative effect of the enumerated errors in depriving him of due process and fair trial. The Court rejected that claim as well based on the Supreme Court's holding that distinct violations may not be cumulated for the purposes of receiving habeas relief. The Court now concludes that this proposition is likewise not debatable by reasonable jurists and that the petitioner failed to make a substantial showing of the denial of a constitutional right that would entitle the petitioner to proceed.

Accordingly, it is **ORDERED** that a certificate of appealability to proceed on the claims other than ineffective assistance of counsel for failing to investigate the alternative causes of victim's injuries is **DENIED.**

s/David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: September 23, 2008

Certificate of Service

I hereby certify that on September 23, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system, and I further certify that I mailed a copy to the non-ECF participant(s).

s/ Felicia M. Moses

No. 08-1089

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEVIN TUCKER

Petitioner-Appellee/Cross-Appellant,

v.

FILED
Jan 12, 2009
LEONARD GREEN, Clerk

JOHN CASON, Warden,

Respondent-Appellant/Cross-Appellee.

Kevin Tucker, a Michigan prisoner proceeding through counsel, appeals the district court's partial denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Tucker's appellate brief has been construed as an application for a certificate of appealability.

In 2000, a jury convicted Tucker of three counts of first-degree criminal sexual conduct involving a minor. He was sentenced to 85 to 240 months in prison. Tucker moved for a new trial, asserting that trial counsel (Mr. Bain) had rendered ineffective assistance by failing to obtain the complainant's medical records from an automobile accident. After conducting an evidentiary hearing, the trial court denied the motion. The Michigan Court of Appeals affirmed Tucker's convictions on direct appeal on March 4, 2004. *People* v. *Tucker*, No. 232094, 2003 WL734168 (Mich. Ct. App. Mar. 4, 2003). On September 25, 2003, the Michigan Supreme Court denied leave to appeal.

In his § 2254 petition, Tucker asserted that:

I. The trial court reversibly erred in refusing the jury's reasonable requests for the rereading of trial testimony, in violation of the right to due process and a fair trial, and defense counsel was ineffective for failing to object.

II. Defense counsel was ineffective for failing to have Dr. Inocencio's report and the photographs taken during her examination reviewed by another doctor, for failing to obtain the medical records from [the complainant's] automobile accident, for conceding that sexual abuse occurred, for eliciting testimony that [the complainant's] previous statements and testimony were consistent with her trial testimony, when they were inconsistent, and for failing to impeach witnesses with prior inconsistent testimony.

III. The petition should be granted where the court permitted highly prejudicial testimony that Mr. Tucker was a cross dresser over defense objection, without giving a cautionary instruction, despite the court's intention to do so, and, in the alternative, defense counsel was ineffective for failing to object to the failure to give a cautionary instruction.

IV. The cumulative effect of these errors denied due process and the right to a fair trial.

The state filed an answer, and Tucker filed a reply.

Upon review, the district court granted a conditional writ of habeas corpus with respect to the part of the second claim asserting that trial counsel rendered ineffective assistance by failing to obtain the medical records from the complainant's automobile accident.

The district court denied the petition as to the other claims. The first claim was procedurally defaulted because counsel had failed to object to the trial court's responses at trial, and Tucker did not demonstrate that counsel's failure to do so had prejudiced him. *See Baze v. Parker*, 371 F.3d 310, 321 (6th Cir. 2004).

The remainder of the second claim lacked merit in part and was procedurally defaulted in part. Tucker argued that review of Dr. Inocencio's report by another doctor would have revealed a normal examination with possible irregularities caused by the automobile accident. However, counsel had attempted to have other doctors review Dr. Inocencio's report. Two did not respond to phone calls after receiving a copy of the report, and the third indicated on the phone that the type of injuries suffered by the complainant alternatively could have been caused by impalement on a picket fence. Counsel thus conducted a reasonable investigation and made a reasonable conclusion that expert testimony by another doctor would not have been helpful. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984).

The portion of the second claim challenging counsel's concession of sexual abuse at trial was procedurally defaulted as Tucker failed to present any argument in support of his claim. *See Roberts v. Carter*, 337 F.3d 609, 613 (6th Cir. 2003).

The district court concluded that there was no merit to the portion of the second claim alleging inconsistent testimony and challenging counsel's failure to impeach the witnesses. Counsel's decision concerning impeachment was a strategic matter entitled to deference. Furthermore, Tucker did not identify any contradictions by the same witness, and the jury had been made aware of discrepancies between the testimony of witnesses. Thus,

the result of the proceeding would not have been different had counsel aggressively impeached the witnesses.

The third claim lacked merit because counsel made strategic decisions not to request an instruction on cross-dressing and not to object to the lack of the promised instruction.

Finally, the claim of cumulative error failed because the Supreme Court has not recognized cumulative error as a basis for habeas relief. *See Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2003).

The state filed a notice of appeal with this court, currently pending in Case No. 07-2481. Tucker then filed the instant cross-appeal. After the cases were consolidated and briefed, this court remanded the action to the district court to determine whether a certificate of appealability should issue. The district court then denied a certificate of appealability as to the previously denied claims.

Because Tucker did not file an application for a certificate of appealability following remand, we construe Tucker's brief as such. In his brief, Tucker reasserts only his second claim.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2); *cf. Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). A petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot*, 463 U.S. at 893 n.4).

We conclude that Tucker has failed to make a substantial showing. Tucker has abandoned his first, third, and fourth claims by not reasserting them in his brief, and the district court's denial of the remainder of the second claim is not debatable amongst jurists of reason.

Accordingly, we deny the application for a certificate' of appealability.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk